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No. [redacted] 5

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1928.

JOHN JOHNSON,

*Petitioner,*

against

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

JOHN JOHNSON, your petitioner, respectfully prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled action on the 26th day of March, 1928.

### The Matter Involved.

ONE.—The petitioner is a citizen of the United States, age about 55 years (R., 14), and is and for many years

has been a merchant seaman by vocation, and for a number of years has shipped as bos'n on merchant vessels (R., 15). The respondent is a corporation organized under the laws of the District of Columbia, and is engaged in the business of operating merchant vessels under the American flag.

Two.—On October 1, 1920, the day of the accident, the *S/S Jacksonville,* an American vessel, owned and operated by the respondent, was lying in navigable waters of the United States, to-wit, in the harbor of Jacksonville, Florida, alongside the *S/S West Compo* with one gang-plank stretched between the *S/S Jacksonville* and the *S/S West Compo* and one gang-plank stretched between the *S/S West Compo* and the dock (R., 126, 15, 16).

Three.—While petitioner was at a hotel at Jacksonville, Florida, on October 1, 1920, the bos'n of the *S/S Jacksonville,* came to the petitioner who was in his room in his hotel and told petitioner that a man was wanted on board the vessel as a carpenter or handy-man and asked petitioner to go with him on board said vessel and see the ship's officer with respect to signing on. Petitioner accompanied the bos'n who paid petitioner's street car fare (R., 15), and went on board the *S/S Jacksonville,* crossing over the deck of the *S/S West Compo* which lay between the *S/S Jacksonville* and the dock and crossing a gang-plank from the deck of the *S/S West Compo* to the *S/S Jacksonville* (R., 15).

Four.—After waiting on board a short time for the ship's officer who was ashore, the petitioner started to return to the hotel where his working clothes were, with a view of returning with his clothes the next day (R., 18).

FIVE.—The gang-plank between the *S/S Jacksonville* and the *S/S West Compo,* was on a steep slant, downward toward the *S/S Jacksonville,* and upward toward the *S/S West Compo,* so that as petitioner started to return to the shore, he climbed upward on this gang-plank (R., 16, 19, 149). The gang-plank was insecure and moved to one side when he got about half way upward from the *S/S Jacksonville's* deck. He was caused to lose his balance and fall. As he fell he caught his arm around a steel stanchion to which he held until his arm broke, whereupon he fell between the vessels (R., 19). As a result of the fall petitioner sustained besides a broken arm, a fracture of the skull, scalp wounds, several broken bones, broken jaw bones, injuries to the kneecap and shoulder blades (R., 19, 20, 21, 27, 71).

SIX.—The gang-plank was but a makeshift gang-plank suspended between two vessels, and on the *S/S Jacksonville's* end, was supported and steadied by only one rope on one side of the plank suspended from a smoke-stack guy (R., 46, 60, 16, 185). The deck of the *S/S Jacksonville* at this point was a canvas-covered deck, and merely to protect the canvas, the makeshift gang-plank had been rigged up so that at the *S/S Jacksonville's* end it rested on a shaky box instead of upon the deck (R., 175, 185, 47). The presence of only one line from the smoke-stack guy on the one side of the gang-plank left it wholly insecure. Even one of defendant's witnesses described it as "a fool-rigged gangway" (R., 184). As the gangway was about 12 feet long, and the *S/S West Compo* 8 to 10 feet higher in the water than the *S/S Jacksonville,* the angle of the make-shift gangway rendered it even more insecure when climbing upward upon it. Petitioner failed to notice when he stepped up from the deck of the *S/S Jacksonville's* end of the gang-plank that it was insecurely fastened, and did not

notice it until it began to shake and when he was midway between the vessels. Then it was too late (R., 16).

SEVEN.—With respect to the petitioner's failure to observe the insecure fastening of the gang-plank, the Court charged:

> "If he could see it and thought it was improperly swung and if he was cognizant of the requirement, then it is for you to say whether or not in using that and continuing to go on it he himself was guilty of contributory negligence and contributed to the happening of this accident. If he knowingly used that which he could see was unfit for this use, then it is a question of fact as to whether or not there was such neglect on his part that it contributed to the accident.
>
> If he knowingly used that which he could see was unfit for this use, then it is a question of fact as to whether or not there was such negligence on his part that it contributed to the accident. If he was guilty of contributory negligence then he could not recover. If you find that he was guilty of contributory negligence the verdict would have to be for the defendant" (R., 200, 201).

On exception and request by counsel the Court further charged:

> Mr. Axtel: Exception. I ask your Honor to charge the jury the rules on the question of contributory negligence as to this maritime law.
>
> The Court: I decline. The action does not lie in admiralty and was not so brought.
>
> Mr. Axtell: Exception" (R., 210).

EIGHT.—On request by petitioner's counsel to charge that if the jury found that the watchmen on the pier permitted plaintiff to pass and get on board the ship that petitioner was "not a trespasser at least," the Court further charged the jury as follows:

> "The Court: He was a licensee on a vessel. I decline to charge that, * * * etc." (R., 210).

NINE.—The jury was out from 6:05 P. M. to 9 P. M. and returned with a verdict for the defendant. A motion made by petitioner's counsel to set aside the verdict was denied with exception. Judgment was entered for the defendant (R., 211).

TEN.—Petitioner thereupon duly procured a writ of error to take the case before the Circuit Court of Appeals for the Second Circuit and filed a bill of exceptions together with two assignments of error, as follows:

> "That the verdict of the jury was contrary to the weight of evidence, and that the Court erred in denying plaintiff's motion to set the verdict aside.
>
> "That the trial Court erred in charging the jury as follows: 'If he was guilty of contributory negligence then he could not recover. If you find that he was guilty of contributory negligence the verdict would have to be for the defendant' " (R., 217).

ELEVEN.—The Circuit Court of Appeals ruled herein as follows:

> "The plaintiff-in-error assigns error for the charge of the Court, which instructed the jury that if the plaintiff-in-error was guilty of contributory negligence he could not recover. The plaintiff-in-error now argues that this was a maritime tort, and

that the maritime law controls, and, therefore, the contributory negligence was not an absolute bar to a recovery. We think the Court correctly instructed the jury under the authority of Belden vs. Chase, 150 U. S., 674, 14 S. Ct., 264, 37 L. Ed., 1218; Atley vs. Packet Co., 21 Wall., 389, 22 L. Ed., 619, and Maleeny vs. Standard Shipbuilding Co., 237 N. Y., 250, 142 N. E., 602. We have not overlooked the Castagna case (C. C. A.), 280 F., 618, where, in a dictum, it was inadvertently stated the rule is different than stated in Belden vs. Chase, supra.

Judgment affirmed, with costs."

TWELVE.—The foregoing per curiam opinion of the Circuit Court of Appeals for the Second Circuit rendered March 19, 1928, was made the basis of a decree of that court rendered and entered the 26th day of March, 1928, to review which this appeal for a writ of certiorari is made.

**Reasons Relied Upon for the Allowance of This Writ.**

THIRTEEN.—Upon the foregoing specifications of fact as to the plaintiff's case and upon the charge of the lower Court and the decision and decree of the Circuit Court of Appeals for the Second Circuit, an important question of federal law has been decided in a way that is in conflict with the applicable decisions of this Court.

The decisions relied upon are those in the cases of *Chelentis* vs. *Luckenbach Steamship Company*, 247 U. S., 372 (1918); *Atlantic Transport Company* vs. *Imbrovek*, 234 U. S., 52 (1913); the *Port of New York Stevedoring Co.* vs. *Castagna*, 258 U. S., 631 (1922); *Carlisle Packing Co.* vs. *Sandanger*, 259 U. S., 255 (1922); *Southern Pacific Co.* vs. *Jensen*, 244 U. S., 205 (1917), and *Knickerbocker Ice Co.* vs. *Stewart*, 253 U. S., 149 (1919).

In these cases this Court has stated in clear and emphatic terms that every specie of tort occurring on navigable waters, is of admiralty cognizance; that the general rules of maritime law apply whether the proceeding be instituted in an admiralty or common law court; that the right to recover, irrespective of contributory negligence is a matter of right and not a matter of procedure. The charge of the lower Court as sustained upon appeal, in view of these decisions, whether proceeding from a mistaken opinion that contributory negligence is a matter of remedy rather than of right, or from a mistaken view as to the applicability of the old cases of *Belden* vs. *Chase* and *Atlee* vs. *Packet Co.*, supra, is wholly erroneous.

FOURTEEN.—There is a confusion in the law of the several states and in the federal courts as to the right to recover irrespective of contributory negligence where action for a maritime tort is brought in a common law court, and the public interest will be promoted by the prompt settlement in this court of the questions involved in this case.

The cases showing this confusion upon this point of the law on the part of the lower Courts are: *J. H. Burton & Sons Co.* vs. *May*, 212 Ala., 435 (S. Ct., Ala., 1925), 1925 A. M. C., 707; *Joyce* vs. *Convoy S. S. Co.*, 17 F. (2d), 482 (D. C., Me., 1924); *McPherson* vs. *Twin Harbor S. & T. Co.*, 1926 A. M. C., 1030 (S. Ct., Washington, 1926); *Kennedy* vs. *Cunard S. S. Co.*, 197 A. D., 459 (1921), affirmed 235 N. Y., 604 (S. Ct., New York, 1923); *Maleeny* vs. *Standard Shipbuilding Co.*, 237 N. Y., 250 (S. Ct., New York, 1923).

FIFTEEN.—In the refusal of the trial Court, sustained on appeal, to charge that the petitioner, upon the facts as stated in his case, did not have the legal status of "*seaman,*" which would have entitled him to the charge requested both as a matter of statutory law and court decision, an erroneous decision has been made upon an important question of federal law which has not been, but should be, settled by this Court.

The contention is sustained by sound argument and by a consideration of the following authority: U. S. Code, Tit. 46, Sec. 713; *International Stevedoring Co.* vs. *Haverty,* 272 U. S., 50 (1926); U. S. Code, Tit. 46, Sec. 688, as incorporating U. S. Code, Tit. 45, Sec. 53.

SIXTEEN.—The refusal of the trial Court, sustained on appeal, to charge that the petitioner on the facts as stated by him was not "a trespasser at least" or in other words, a licensee or invitee, is a decision prejudicial to the substantial rights of the petitioner in that it aided in depriving him of the ruling requested, and is a decision in conflict with the previous decisions of this Court.

The decision of the trial Court was opposed to the leading case of *Leathers* vs. *Blessing,* 105 U. S., 626 (1881), and to the later case of *Anderson* vs. *The E. B. Ward, Jr.,* 38 Fed., 44 (1889).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out under the seal of this honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, demanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of the proceedings in the case numbered and indexed on its Docket, No. 194, October Term, 1927, and that the said decree of said court may be reversed by this honorable Court and that your petitioner may have such other and further relief in the premises as to this honorable Court may seem just and proper.

Respectfully submitted,

JOHN JOHNSON,
Petitioner,

By SILAS B. AXTELL,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Decision of the Lower Court.

The opinion of the United States Circuit Court of Appeals for the Second Circuit, not yet officially reported, is annexed to the record on appeal on page 223, together with the decree entered by the Court upon that decision. The decision and opinion of the Court was made March 19, 1928.

The charge of the District Court of the United States for the Eastern District of New York is not reported but is set out verbatim in the record on pages 196-211, inclusive.

### Jurisdiction.

The date of the decree to be reversed, is March 26, 1928 (R., 223).

This application for a writ of certiorari is made in time within the meaning of Section 8(a) of the Jurisdictional Act of February 13, 1925, which provides that no writ of error intended to bring any judgment or decree before the Supreme Court shall be allowed or entertained unless application therefore be duly made within three months after the entry of such judgment or decree.

It is undisputed that the subject matter of this action is that of a maritime tort arising out of personal injuries occurring and caused upon navigable waters of the United States (R., 126, 15, 16), of which this Court has jurisdiction (*Atlantic Transport Co.* vs. *Imbrovek,* 234 U. S., 52, 1913).

The specific claims advanced, the errors relied upon and the rulings of the lower Court, together with the cases relied upon, and the reasons advanced for the taking of jurisdiction by this Court are stated in the foregoing petition and for the sake of brevity are not repeated at this point.

## Statement of Case.

A full statement of the case has been given in the petition and in the interest of brevity that statement is referred to here and is not repeated.

## Assignment of Errors.

(1) The lower Court erred in holding that the trial Court correctly instructed the jury that if the petitioner was guilty of contributory negligence he could not recover.

(2) The lower Court erred in failing to hold that petitioner had the legal status of "seaman" for the purpose of entitling him to the ruling that his contributory negligence was not a bar to a recovery, providing the jury found that the petitioner was on board defendant's ves-

sel at the defendant's specific instance and request with respect to employment.

(3) The lower Court erred in failing to hold that the petitioner was a licensee or invitee for the purpose of entitling him to the ruling that his contributory negligence was not a bar to a recovery, providing the jury found plaintiff was on board the defendant's vessel at the defendant's specific instance and request.

## ARGUMENT.

### FIRST.

**In the decisions of the lower Court an important question of Federal law has been decided in a way that is in conflict with the applicable decisions of this Court.**

This Court has squarely held that, in an action for a maritime tort, brought in a common law court, the substantive rules of common law relating to non-maritime torts are not applicable, and that the substantive rules of maritime law are applicable to the adjudication of an action for a maritime tort, whether the proceeding therefore be brought in an admiralty court or in a common law court.

*Chelentis* vs. *Luckenbach S. S. Co.*, 247 U. S., 372 (1917);

*Port of New York Stevedoring Co.* vs. *Castagna*, 280 F., 618, 258 U. S., 631 (1922);

*Carlisle Packing Co.* vs. *Sandanger*, 259 U. S., 255, 259 (1922);

*Southern Pacific Co.* vs. *Jensen*, 244 U. S., 205 (1917);

*Knickerbocker Ice Co.* vs. *Stewart*, 253 U. S., 149 (1919);

*Atlantic Transport Co.* vs. *Imbrovek*, 234 U. S., 52 (1913).

In the *Chelentis* case, supra, an action at law, a person employed on a steamship as a fireman lost a leg, having been injured while in the performance of his duties; the vessel being at sea. He brought an action in a state court to recover damages, and the action was removed to the U. S. District Court because of diverse citizenship. Under the maritime law a seaman was entitled to recover for only maintenance, cure and wages. He claimed, however, to be entitled by the law of the State of New York to recover full common-law indemnity. But the Supreme Court held, affirming the decision of the lower Court, that the liability which existed under the maritime law was not subject to be enlarged to the full common-law indemnity by the law of the state. It was held that no state has the power to abolish the well-established maritime rule concerning the measure of recovery and substitute therefore the rule of the common law. The Court said:

> "Plainly, we think, under the saving clause *a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law;* but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, *without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.*" (Italics ours.)

In the case of the *Port of New York Stevedoring Company*, supra, an action at law, a longshoreman was precipitated into the hold of a steamer that was in navigable waters of the United States, when a rotten board, of which he had taken hold, broke. There was a question

as to whether the condition of the board was so plainly observable that an ordinarily prudent person would have appreciated the defect. In upholding the right of the plaintiff to recover irrespective of his contributory negligence, in a common law action, the Court, *Mayer*, J., stated on page 624, the reason therefore to be that the matter is one of right and not of remedy:

> "*The right to recover irrespective of contributory negligence is a right, and not a matter of procedure, nor is it governed by the choice of the forum.* In the case at bar, plaintiff sought his remedy at common law to obtain redress arising out of a maritime tort. He entered the common-law court with the same right as he would have entered the admiralty court. That was the right to recover, irrespective of his own negligence, provided, of course, he could show the negligence of his employer, *and this right of plaintiff sprang into existence because he suffered a maritime tort.* The trial judge was peculiarly familiar with the question, for it was he who wrote the opinion in Carter vs. Brown, supra, and our view is that his charge as to contributory negligence was sound." (Italics ours.)

In the opinion of the Circuit Court denying the petitioner the right to recover irrespective of his contributory negligence (R., 223), the Court refers to this part of the opinion in the *Port of New York Stevedoring Company* case as an inadvertence. This statement probably proceeds from the Court's statement in that case that "so far as we are able to ascertain, there was no evidence of contributory negligence, and this part of the Court's charge was doubtless due to extraordinary caution. The question of the contributory negligence seems on this record to be academic." It is sufficient to state, in answer to the Circuit Court's characterization of this holding as

inadvertence, that the question of the evidence of contributory negligence was one of fact for the jury and that, therefore, the ruling of the Court on this subject was directly in point. The Supreme Court denied a writ of certiorari in this case (257 U. S., 618, 1922).

In the *Carlisle Packing Company* case, supra, this Court sustained a judgment obtained in a trial Court for personal injuries suffered while the petitioner was employed on a motorboat in Alaskan waters. In upholding the right to recover for the unseaworthiness of the ship in a common-law court it was said on page 259,

> "the general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court."

The extract from the opinion in the *Carlisle Packing Co.* case, supra, is merely a reaffirmance by this Court of the rule first announced in the *Chelentes* case, supra, which it cites. The development of the rule and the reasons therefor are fully explained in the case of *Southern Pacific Co.* vs. *Jensen,* 244 U. S., 205 (1917) and *Knickerbocker Ice Co.* vs. *Stewart,* 253 U. S., 149 (1919).

The principle that the maritime law extends to all cases of maritime tort occurring on navigable waters is well stated in the *Imbrovek* case, supra, which is the starting point of the principle developed in the foregoing cases. The Court, *Hughes,* J., said in this case:

> "Every specie of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

The cases relied upon by the lower Court as sustaining the ruling that in an action at law for a maritime tort, contributory negligence is a bar, are wholly inapplicable on their facts and doctrines, and were decided long before the real extent and character of the admiralty law

was developed by this Court, beginning with the *Imbrovek* and related cases, cited supra.

The case of *Belden* vs. *Chase,* 150 U. S., 674, was decided in 1893 prior to all the later and better reasoned cases of this Court upon the particular type of case now presented, to wit, maritime tort for personal injuries. It concerned the collision of two steamships in the Hudson River, and was a review of a case coming from the state courts of New York, at that time limited in their maritime jurisdiction.

The case of *Atlee* vs. *Packet Co.,* 21 Wall., 389, was decided by this Court in 1874 and was upon a libel in admiralty. It concerned a collision between a barge and a pier in the Mississippi River. Manifestly anything there said as to the effect of contributory negligence in a suit at common law was dicta.

The case of *Maleeny* vs. *Standard Shipbuilding Co.,* 237 U. S., 250, aside from being a state court case, relies largely upon the decision in *Belden* vs. *Chase,* supra. In the *Maleeny* case, at page 262, the Court stated that that Court should follow the ruling of the United States Supreme Court in the case of *Belden* vs. *Chase* until that Court modifies or limits this authority, evidently not agreeing with that case as applicable to the maritime law as it existed at the time of the decision, 1923.

## SECOND.

**There is confusion in the law of the several states and in the Federal Courts as to the right to recover for a maritime tort in a common law court irrespective of contributory negligence, and the public interest will be promoted by a prompt settlement of this question by this Court.**

The lack of an authoritative decision upon the point as to the effect of contributory negligence in an action to

recover for a maritime tort in a common-law court, has resulted, as may have been expected, in conflicting decisions in the courts of the various states and in the lower federal courts.

*J. H. Burton & Sons Co.* vs. *May*, 212 Ala., 435, 1925 A. M. C., 707 (S. Ct., Alabama, 1925);
*Joyce* vs. *Convoy S. S. Co.*, 1 F. (2nd), 482 (D. C., Maine, 1924);
*McPherson* vs. *Twin Harbor S. & T. Co.*, 1926 A. M. C., 1030 (S. Ct., Washington, 1926);
*Kennedy* vs. *Cunard S. S. Co.*, 197 A. D., 459 (1921), affirmed 235 N. Y., 604 (S. Ct., New York, 1923);
*Maleeny* vs. *Standard Shipbuildng Co.*, 237 N. Y., 250 (S. Ct., New York, 1923).

The Supreme Court of Alabama in the *J. H. Burton & Sons Co.* case, supra, an action at law, decided in favor of the ruling contended for by the petitioner. This Court recognized the existing authority of *Belden* vs. *Chase*, but boldly made its decision under the authority of this Court as announced in the later cases of *Chelentis* vs. *Luckenbach* and *Carlisle Packing Co.* vs. *Sandanger*, supra. The Court stated:

> "A claim in a state court in an action for a maritime tort committed upon navigable waters and within the admiralty jurisdiction of a right under the Federal statute presents a Federal question, and that jurisdiction cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common-law remedy in a state court. On the authority of Atlee v. Northwestern Union Packet Co., 88 U. S. (Wall.), 389, 22 L. Ed. 619, it was held that, if both vessels are culpable in respect of operating, etc., neither can recover damages for injuries so caused. Belden v. Chase, 150 U. S., 674,

14 S. Ct., 264, 37 L. Ed., 1218. *However, by the later cases it has been held by the Supreme Court of the United States that the general rules of maritime law apply to suits for maritime torts brought in the common-law courts of the United States* Carlisle Pack. Co. v. Ole Sandanger, 259 U. S., 255, 42 S. Ct., 475, 66 L. Ed., 927; Chelentis v. Luckenbach, etc., Co., 247 U. S., 372, 38 S. Ct., 501, 62 L. Ed., 1171; Knickerbocker, etc., Co. v. Stewart, 253 U. S., 149, 40 S. Ct., 438, 64 L. Ed., 834, 11 A. L. R., 1145; South. Pac. Co. v. Jensen, 244 U. S., 205, 37 S. Ct., 524, 61 L. Ed., 1086, L. R. A., 1918C, 451, Ann. Cas., 1917E, 1900; and that every species of tort, however occurring and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance (Atlantic Trans. Co. v. Imbrovek, 234 U. S., 52, 32 S. Ct., 835, 56 L. Ed., 1263, 58 L. Ed., 1208, 1212, s. c., 51 L. R. A. [N. S.], 1157, note), or is of common-law cognizance within the jurisdiction saved 'to suitors in all cases (where) the right of a common-law remedy (exists) when the common-law is competent to give it.' South. Pac. Co. v. Jensen, 244 U. S., 205, 37 S. Ct., 524, 61 L. Ed., 1086, 1099, L. R. A., 1918C, 451, Ann. Cas., 1917E, 900; Steamer Max Morris v. Curry, 137 U. S., 1, 11 S. Ct., 29, 34 L. Ed., 586, 589." (Italics ours.)

The Federal District Court of Maine in substance decided the principle of law as contended for by the petitioner by holding that in an action brought to recover for a maritime tort under a death statute of Maine, contributory negligence must be determined not under the common law, but under the maritime law. This Court said in the *Joyce* case, supra:

"It is clearly my duty to follow the law laid down by the Supreme Court in Southern Pacific Co. vs.

> Jensen, 244 U. S., 215, 37 Sup. Ct., 524, 61 L. Ed., 1086, L. R. A. 1918C, 451 Ann. Cas., 1917 E., 900, supra. It is not for me to determine the duty of a state court; *but I think a state court in case of a maritime tort should also be controlled by the same maritime rule laid down by the Supreme Court of the United States, and that it should not follow the common-law rule of procedure which it would follow in a case not maritime in its nature,* * * *." (Italics ours.)

In the *McPherson* case, supra, the Supreme Court of Washington sustained a verdict for the plaintiff and held, on page 1034, that the common-law rule of contributory negligence that was charged was not correct, but that there was no reversible error inasmuch as the verdict would have been for the appellant even though the jury had found contributory negligence. The head-note to this case is wrongly edited.

In the *Kennedy* case, supra, the Appellate Division of the First Department of New York held, prior to the *Maleeny* case, supra, in an action at law by a longshoreman to recover for injuries received by falling into an open hatchway, that the rules relating to contributory negligence should be determined by the maritime law and not by the common law. The Court said on page 409:

> "The instant case is an action for damage for personal injuries, for which there exists in this state a common-law remedy. Therefore, the action may be brought in our Supreme Court, *the rules of practice, pleading, and evidence of our courts apply,* and the cause will be tried in conformity therewith, *but the rules relating to contributory negligence, acts of fellow servants, and the measure of recovery must be determined by the maritime law, and not by the common law.*" (Italics ours.)

The *Kennedy* case was affirmed without opinion by the Court of Appeals in April, 1923, the Court stating, however, that the question of comparative negligence was not passed upon. In December of that year the *Maleeny* case was decided with an extended opinion, mentioned, supra, which must be interpreted as having overruled the *Kennedy* case.

From these cases it would seem that the lack of an authentic decision by the Supreme Court upon this important point of maritime law has led the lower courts to follow an outworn principle of admiralty law. The later expressions of the proper application and scope of the maritime law as developed in recent years, by this Court, clearly show the conflicting trend of the decision and decree of the Circuit Court in this case.

## THIRD.

**In refusing to accord petitioner the legal status of seaman which would have entitled him to the admiralty rule of contributory negligence requested, an erroneous decision has been made upon an important question of Federal law which has not been but should be settled by this Court.**

Petitioner was a seaman by vocation (R., 15). It was at the specific instance and request of respondent that the petitioner went on respondent's ship in respect to employment (R., 15). The petitioner is justly entitled to the classification of seamen for the purpose of recovering for a maritime tort, for which respondent is responsible.

*International Stevedoring Co.* vs. *Haverty*, 272 U. S., 50 (1926);
*U. S. Code*, Tit. 46, Sec. 688, as incorporating *U. S. Code*, Tit. 45, Sec. 53;
*U. S. Code*, Tit. 46, Sec. 713.

In the case of the *International Stevedoring Company*, supra, the Court allowed a stevedore, although not in the strict sense a seaman, to have the benefit of the provisions of the Seamen's Act abolishing the fellow servant rule in order to sustain a recovery.

The specific request made to the petitioner by the ship's officer duly authorized (R., 106, 107, 108), to leave his hotel and go on board the ship, was the first act of an employment, constituting petitioner a seaman within the meaning of the *Jones* Act, *U. S. Code*, Tit. 45, Sec. 713, which would have entitled him to a ruling that his contributory negligence was not a bar, *U. S. Code*, Tit. 46, Sec. 688, as incorporating *U. S. Code*, Tit. 45, Sec. 53.

The prospect of employment held out to petitioner was specifically that of a "seaman" and in responding to the request of the respondent, a definite contractual status was established as to a maritime matter, which in fact and law made him a "seaman."

## FOURTH.

**In the refusal to charge, that if the jury found the facts to be as stated by the petitioner, the petitioner was an invitee or licensee, or at least not a trespasser, which would have entitled the petitioner to the admiralty ruling requested, a decision was made in conflict with the applicable decisions of this Court.**

Whether or not the legal status of the petitioner was properly that of a seaman, it is submitted that in any event, on the facts of his case, he was an invitee or licensee and as such was entitled to bring an action against respondent for the maritime tort which he suffered.

> *Leathers* vs. *Blessing*, 105 U. S., 626, 629 (1881);
> *Anderson* vs. *The E. B. Ward, Jr.*, 38 F., 44 (1889).

In *Leathers* vs. *Blessing*, a leading case on this subject, this Court was of the opinion that an invitee who suffered personal injuries on the vessel could recover, therefore, although he sustained only the relation of invitee toward the ship. Blessing had gone on board the steamboat on a matter of business relating to a consignment of cottonseed on board the boat. It was held in a libel action that he could recover for the neglect or malfeasance of the owners. Libellant was not found to be guilty of contributory negligence, but it was decided that the injury was sustained in consequence of a maritime tort.

Under the doctrine of the *Leathers* case extending the admiralty law to invitees in the case of a maritime tort, and under the admiralty law as later developed to apply to a common law action as shown in the case of *Chelentis* vs. *Luckenbach, etc., Co.*, the *Port of New York Stevedoring Company* vs. *Castagna*, and in the case of *Carlisle Packing Co.* vs. *Sandanger*, supra, the admiralty rule of contributory negligence would and should have been applied in the petitioner's case.

## CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers so that there may be a clear and an unambiguous decision as to the right to recover at law for a maritime tort irrespective of contributory negligence, further, in order that there may be a clear decision as to at just what point in the master and servant relationship between the seaman and shipowner, the legal status of seaman arises, and, lastly, that this Court may clearly decide the right of the petitioner as an invitee or licensee, if not a seaman, to have the benefit of the admiralty rule of contributory negligence in an action at law to

recover for a maritime tort, and that a writ of certiorari should be granted and that this Court should review the decision of the Circuit Court of Appeals of the Second Circuit, and finally reverse it.

Respectfully submitted,

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IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1928.

No. 220 5

JOHN JOHNSON,

*Petitioner,*

—against—

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

*Respondent.*

## BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THE COURT PRESS—Law Printers—47 West Street—Bowling Green 2820-1-4

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IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1928.

JOHN JOHNSON,

*Petitioner,*

—against—

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

*Respondent.*

## *BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

### *Decision of the Lower Court.*

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in *Johnson* v. *United States Shipping Board Emergency Fleet Corporation,* 24 F. (2nd) 963, and is copied in the record herein at page 184.

### *Statement of Case.*

This is an action at common law, first brought in the Supreme Court of the State of New York (R., 2) to recover for personal injuries sustained by John Johnson, the petitioner. At the time the injuries were sustained, Johnson was walking up a gangplank which was insecurely and improperly rigged on the respondent's vessel, the SS. "Jacksonville". The action was removed to the United States District Court for the Eastern District of

New York (R., 4), and a trial was had with a jury in that Court. The trial Judge instructed the jury that if the plaintiff was guilty of contributory negligence, then he could not recover. This charge was the subject of an appeal to the Circuit Court of Appeals for the Second Circuit and to this Court.

Johnson is a merchant seaman by vocation, he having followed the sea since 1889 (R., 24), and having shipped for a number of years as boatswain on merchant vessels. Johnson had gone on board the SS. "Jacksonville" at the request of the boatswain of the vessel and in his company, in order to sign on as a carpenter or handy-man (R., 9).

On the day of the accident, October 1, 1920, the SS. "Jacksonville" was lying in navigable waters of the United States, in the harbor of Jacksonville, Florida, alongside the SS. "West Compo" with one gangplank stretched between SS. "West Compo" and the SS. "Jacksonville" and another gangplank stretched between the SS. "West Compo" and the dock (R., 9, 10, 105, 106).

On the same day, October 1, 1920, Johnson was at his hotel in Jacksonville, temporarily out of work, when the boatswain of the SS. "Jacksonville" came to his room at the hotel and told him that a man was wanted on board his ship, the SS. "Jacksonville" as a carpenter or handy-man, and asked Johnson to go with him to the ship about four miles away (R., 33) with respect to signing on (R., 9). The direct testimony of Johnson on this point was (R., 9):

> "The boatswain of the "Jacksonville" came to the room where I was laying down and asked me to go down and see the chief officer, there was a

man wanted on board, a carpenter or handy-man. I should go down and I would see him in the evening. He expected him on board. I went down with him, he paid my fare down on the car, passed the gate at the Shipping Board yard, two watchmen were just relieving one another at 6 o'clock, and one stayed a little over and the boatswain asked him if we could pass through. He answered yes. He asked what I wanted to go aboard for. He told him to see the chief officer for to get a job; he wanted a man in the morning."

The ship's watchman on the wharf allowed Johnson and the boatswain to pass over the pier. They went on board the SS. "Jacksonville", crossing over the deck of the SS. "West Compo", which lay between the SS. "Jacksonville" and the dock, and crossing the gangplank from the SS. "West Compo" to the SS. "Jacksonville" (R., 9).

After waiting on board a short time for the ship's officer, who was ashore, the petitioner started to return to the hotel, where his working clothes were, with a view of returning with his clothes the next day (R., 11, 12).

The gangplank between the SS. "Jacksonville" and the SS. "West Compo" was on a steep slant, downward toward the SS. "Jacksonville", and upward toward the SS. "West Compo", so that as petitioner started to return to the shore, he climbed upward on this gangplank (R., 10). The gangplank was insecure and moved to one side when he got about half way upward from the SS. "Jacksonville's" deck. He was caused to lose his balance and fall. As he fell he caught his arm around a steel stanchion, to which he held until his arm broke, whereupon he fell between the vessels (R., 12). As a result of the fall petitioner sustained besides a broken arm, lacerations of the skull, scalp wounds, several

broken bones, broken jaw bones, injuries to the kneecap and shoulder blades (R., 12, 13, 18, 19, 21, 62, 63, 64).

The gangplank was but a makeshift gangplank suspended between two vessels, and on the SS. "Jacksonville's" end, was supported and steadied by only one rope on one side of the plank suspended from a smokestack guy (R., 36, 10, 49). The description of this gangway as given by Johnson upon cross examination was as follows (R., 36):

> "Q. In other words, your testimony is, the only thing that held steady the 'Jacksonville' end of the gangplank was a sling which was tied to a davit? A. Not to a davit, to the smokestack guy. The davit was hanging loose. It might have been tied there before. It was turned around to the gangway and nothing on it whatsoever.
>
> Q. So there was a stay from the smokestack? A. Yes, sir.
>
> Q. And this rope was tied on to that? A. Yes, sir.
>
> Q. And that loop came around the lower end of the gangplank? A. Yes.
>
> Q. And that is the way in which it held? A. That is the way I seen it.
>
> Q. That is the way it was then if you saw it that way, wasn't it? A. Yes, sir."

The deck of the SS. "Jacksonville" at this point was a canvas-covered deck, and merely to protect the canvas (R., 149), the makeshift gangplank had been rigged up so that at the SS. "Jacksonville's" end it rested on a box instead of upon the deck (R., 149, 26, 44, 10). The presence of only one line from the smokestack guy on the one side of the gangplank left it wholly insecure.

Even one of defendant's witnesses described it as "a fool-rigged gangway" (R., 158). As the gangway was about 12 feet long, and the SS. "West Compo" 8 to 10 feet higher in the water than the SS. "Jacksonville" (R., 10, 35), the angle of the makeshift gangway rendered it even more insecure when climbing upward upon it.

With respect to the petitioner's failure to observe the insecure fastening of the gangplank, the Court charged (R., 170, 171):

> "If he could see it and thought it was improperly swung and if he was cognizant of the requirement, then it is for you to say whether or not in using that and continuing to go on it he himself was guilty of contributory negligence and contributed to the happening of this accident. If he knowingly used that which he could see was unfit for this use, then it is a question of fact as to whether or not there was such neglect on his part that it contributed to the accident.
>
> If he knowingly used that which he could see was unfit for this use, then it is a question of fact as to whether or not there was such negligence on his part that it contributed to the accident. If he was guilty of contributory negligence then he could not recover. If you find that he was guilty of contributory negligence the verdict would have to be for the defendant."

On exception and request by counsel the Court further charged (R., 178):

> "Mr. Axtel: Exception. I ask your Honor to charge the jury the rules on the question of contributory negligence as to this maritime law.

The Court: I decline. The action does not lie in admiralty and was not so brought.
Mr. Axtell: Exception."

On request by petitioner's counsel to charge that if the jury found that the watchmen on the pier permitted plaintiff to pass and get on board the ship that petitioner was "not a trespasser at least", the Court further charged the jury as follows (R., 178):

"The Court: He was a licensee on a vessel. I decline to charge that, * * * etc."

The jury was out from 6:05 P. M. to 9 P. M. and returned with a verdict for the defendant. A motion made by petitioner's counsel to set aside the verdict was denied with exception. Judgment was entered for the defendant (R., 178).

Petitioner thereupon duly procured a writ of error to take the case before the Circuit Court of Appeals for the Second Circuit and filed a bill of exceptions together with two assignments of error, as follows (R., 181):

"That the verdict of the jury was contrary to the weight of evidence, and that the Court erred in denying plaintiff's motion to set the verdict aside.

That the trial Court erred in charging the jury as follows: 'If he was guilty of contributory negligence then he could not recover. If you find that he was guilty of contributory negligence the verdict would have to be for the defendant.'"

The Circuit Court of Appeals ruled herein as follows (R., 184):

"The plaintiff-in-error assigns error for the charge of the Court, which instructed the jury

that if the plaintiff-in-error was guilty of contributory negligence he could not recover. The plaintiff-in-error now argues that this was a maritime tort, and that the maritime law controls, and, therefore, the contributory negligence was not an absolute bar to a recovery. We think the Court correctly instructed the jury under the authority of *Belden* v. *Chase*, 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218; *Atley* v. *Packet Co.*, 21 Wall. 389, 22 L. Ed. 619, and *Maleeny* v. *Standard Shipbuilding Co.*, 237 N. Y. 250, 142 N. E. 602. We have not overlooked the *Castagna* case (C. C. A.), 280 F. 618, where, in a dictum, it was inadvertently stated the rule is different than stated in *Belden* v. *Chase, supra.*

Judgment affirmed, with costs."

The foregoing *per curiam* opinion of the Circuit Court of Appeals for the Second Circuit, rendered March 19, 1928, was made the basis of a decree of that Court rendered and entered the 26th day of March, 1928 (R., 185), to review which an application for a writ of certiorari was made (R., 186).

## *Specification of Errors.*

1. That the trial Court erred in charging the jury as follows:

> "If he was guilty of contributory negligence, then he could not recover. If you find that he was guilty of contributory negligence the verdict would have to be for the defendant."

2. The lower Court erred in holding that the trial Court correctly instructed the jury that if the petitioner was guilty of contributory negligence he could not recover.

## *Argument.*

### *Summary of Argument.*

The points upon which the petitioner relies in support of the writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit are briefly summarized as follows:

POINT I.—The point contended for has been decided by this Court in the case of *Chelentis* v. *Luckenbach Steamship Company,* 247 U. S. 372, 384 (1917).

POINT II.—The denial of the ruling requested as to the maritime rule of contributory negligence was in contravention to the principle of the exclusive jurisdiction of the maritime law with respect to the substantive law of maritime torts.

POINT III.—The trial Court, though proceeding at common law, could and should have proceeded upon the principles of justice and equity of the admiralty jurisdiction in charging the comparative negligence rule as it obtains in admiralty.

POINT IV.—The cases upon which the Circuit Court of Appeals affirmed the ruling of the trial court do not support that ruling.

CONCLUSION.

## POINT I.

**The point contended for has been decided by this Court in the case of *Chelentis* v. *Luckenbach Steamship Company*, 247 U. S. 372, 384 (1917).**

This Court has frequently announced in clear and unambiguous words the principle that the rights of a suitor who goes into a common law court for vindication of his wrongs suffered through a maritime tort are those recognized by the maritime law and not those usually enforced by the common law.

*Chelentis* v. *Luckenbach SS. Co.*, 247 U. S. 372, 384 (1917);
*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 159 (1919);
*Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259 (1922);
*Robins Dry Dock* v. *Dahl*, 266 U. S. 459, 457 (1924).

In what may properly be called the *Chelentis* rule, this Court gave the first authoritative announcement of the principle above stated in the following words:

> "Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law."

Chelentis was employed upon a steamship as a fireman, and lost a leg in consequence of endeavoring to perform an improvident order of his superior officer. He brought an action at law in a state court to recover damages, and the action was removed to the United States District Court because of diverse citizenship. Under the maritime law, a seaman was entitled to recover only for maintenance and cure and wages. He claimed, however, to be entitled by the law of the State of New York to recover the full common law indemnity. The Supreme Court held that the liability which existed under the maritime law was not subject to be enlarged to the full common law indemnity of the State.

The rule of the *Chelentis* case as stated above was quoted and relied upon in the later case of the *Knickerbocker Ice Company,* where, at page 159, the Court cited the quotation given above, and further stated:

> "Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the States so to do. It referred only to remedies and to the extent specified permitted continued enforcement by the state courts of rights and obligations founded on maritime law."

In the *Carlisle Packing Company* case, the Court cites the *Chelentis* and *Knickerbocker* cases, and states the rule still more emphatically at page 259 as follows:

> "The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court."

Sandanger had brought an action at common law to recover for injuries received when a can ordinarily

containing coal oil and which had been filled with gasoline, exploded when he used it. The Court had not instructed the jury with respect to the maritime rules of indemnity as being limited to maintenance and cure, but as it was found that the charge of unseaworthiness could have been given and that the full measure of indemnity would follow in the event the vessel should be found to be unseaworthy the verdict and judgment was not disturbed.

In the case of *Robins Dry Dock* v. *Dahl,* above cited, this court held that the measure of the plaintiff's negligence could not be limited by a State statute, Section 18 of the New York Labor Law, by means of a charge to the jury with respect to plaintiff's negligence. The Court cited the *Chelentis* case, and stated:

> "The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute."

The holding of the Supreme Court in the *Chelentis* case has been followed by the majority of the courts in the States in passing upon the point now contended for, it being held in the majority of instances chiefly upon the authority of the *Chelentis* case that in cases of maritime tort contributory negligence is not an absolute bar to recovery.

> *J. H. Burton & Sons* v. *May,* 212 Ala., 435, 1925 A. M. C. 707 (Sup. Ct. Ala. 1925);
> *McPherson* v. *Twin Harbor S. & T. Co.,* 1926 A. M. C., 1030 (Sup. Ct. Washington, 1926);
> *Joyce* v. *Convoy S. S. Co.,* 1 F. (2d) 482 (D. C. Maine 1924).

The Supreme Court of Alabama in the *J. H. Burton & Sons Co.* case, *supra,* an action at law, decided in favor of the ruling contended for by the petitioner. This Court recognized the existing authority of *Belden* v. *Chase,* but boldly made its decision under the authority of this Court as announced in the later cases of *Chelentis* v. *Luckenbach* and *Carlisle Packing Co.* v. *Sandanger, supra.* The Court stated:

> "A claim in a state court in an action for a maritime tort committed upon navigable waters and within the admiralty jurisdiction of a right under the Federal statute presents a Federal question, and that jurisdiction cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common-law remedy in a state court. On the authority of *Atlee* v. *Northwestern Union Packet Co.,* 88 U. S. (Wall.), 389, 22 L. Ed. 619, it was held that, if both vessels are culpable in respect of operating, etc., neither can recover damages for injuries so caused. *Belden* v. *Chase,* 150 U. S. 674, 14 S. Ct., 264, 37 L. Ed., 1218. *However, by the later cases it has been held by the Supreme Court of the United States that the general rules of maritime law apply to suites for maritime torts brought in the common-law courts of the United States. Carlisle Pack. Co.* v. *Ole Sandanger,* 259 U. S. 255, 42 S. Ct., 475, 66 L. Ed., 927; *Chelentis* v. *Luckenbach, etc., Co.,* 247 U. S. 372, 38 S. Ct., 501, 62 L. Ed., 1171; *Knickerbocker, etc. Co.* v. *Stewart,* 253 U. S. 149, 40 S. Ct., 438, 64 L. Ed., 834, 11 A. L. R., 1145; *South. Pac. Co.* v. *Jensen,* 244 U. S. 205, 37 S. Ct., 524, 61 L. Ed., 1086, L. R. A., 1918C, 451, Ann. Cas., 1917E, 1900; and that every species of tort, however occurring and whether on board a vessel or not, if upon the high

seas or navigable waters, is of admiralty cognizance (*Atlantic Trans. Co.* v. *Imbrovek,* 234 U. S. 52, 32 S. Ct., 835, 56 L. Ed., 1263, 58 L. Ed., 1208, 1912, s. c., 51 L. R. A. [N. S.], 1157, note), or is of common-law cognizance within the jurisdiction saved 'to suitors in all cases (where) the right of a common-law remedy (exists) when the common-law is competent to give it.' *South. Pac. Co.* v. *Jensen,* 244 U. S. 205, 37 S. Ct., 524, 61 L. Ed., 1086, 1099, L. R. A., 1918C, 451, Ann. Cas., 1917E, 900; *Steamer Max Morris* v. *Curry,* 137 U. S. 1, 11 S. Ct., 29, 34 L. Ed., 586, 589." (Italics ours.)

The Federal District Court of Maine in substance decided the principle of law as contended for by the petitioner by holding that in an action brought to recover for a maritime tort under a death statute of Maine, contributory negligence must be determined not under the common law, but under the maritime law. This Court said in the *Joyce* case, *supra*:

> "It is clearly my duty to follow the law laid down by the Supreme Court in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 215, 37 Sup. Ct., 524, 61 L. Ed., 1086, L. R. A. 1918C, 451 Ann. Cas., 1917E, 900, *supra.* It is not for me to determine the duty of a state court; *but I think a state court in case of a maritime tort should also be controlled by the same maritime rule laid down by the Supreme Court of the United States, and that it should not follow the common-law rule of procedure which it would follow in a case not maritime in its nature,* * * *." (Italics ours.)

In the *McPherson* case, *supra,* the Supreme Court of Washington sustained a verdict for the plaintiff and

held, on page 1034, that the common-law rule of contributory negligence that was charged was not correct, but that there was no reversible error inasmuch as the verdict would have been for the appellant even though the jury had found contributory negligence. The headnote to this case is wrongly edited.

Irrespective of the question as to whether Johnson may be held to have established a contractual relation with the SS. "Jacksonville", sufficient to entitle him to the ruling of contributory negligence to which he would be entitled as a "seaman" under the *Jones Act,* there can be no question but that the tort, happening upon navigable waters, was maritime, and that even as a bare invitee, Johnson had the right under the maritime law to an indemnity against the owners of the ship for their negligence in providing the improper and unsafe gangplank. These rights, sanctioned as they were by the maritime law, require an application of the maritime rule of contributory negligence.

*Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52 (1913);

*Leathers* v. *Blessing,* 105 U. S. 626, 629 (1881);

*Anderson* v. *The E. B. Ward, Jr.,* 38 Fed. 44 (1889).

In the *Atlantic Transport Company* case, a stevedore had a recovery in a libel action brought against both the owner of the ship and the stevedoring company for injuries which he received when some hatch covers had fallen upon him while he was loading copper on the ship while it was in the port of Baltimore. It was contended

that there was no jurisdiction for the recovery, but this Court, in an opinion by *Hughes, J.*, said at page 60;

> "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

In the *Leathers* case, the libellant had recovered the sum of $5,707.50 in a libel action *in personam* brought for personal injuries which he received when a bale of cotton, negligently stowed, fell upon him, as he was on his way to the cabin of the vessel, the Steamboat "Natchez". The "Natchez" at the time was lying at the wharf near the foot of Canal Street, City of New Orleans. Blessing was expecting a consignment of cotton and had gone on board to see whether it had arrived. It was shown to be the custom of the officers of the vessel to permit persons expecting a consignment of freight to go on board the vessel to examine the manifest. The Supreme Court affirmed the decree of the lower Court with costs, the Court saying on page 629:

> "This makes the case one of invitation to the libellant to go on board in the transaction of business with the master and officers of the vessel, recognized by them as proper business to be transacted by him with them on board of the vessel at the time and place in question. Under such circumstances, the relation of the master and of his co-owner, through him, to the libellant, was such as to create a duty on them to see that the libellant was not injured by the negligence of the master. On the facts found there was a breach of that duty by the negligence of the master, constituting a maritime tort, of which the District

> Court had jurisdiction in this suit. Not only does the jurisdiction of courts of admiralty in matters of tort depend entirely on locality, but since the case of *Waring* v. *Clarke* (5 How. 441, 464), the exception of *infra corpus comitatus* is not allowed to prevail."

Even respondent's witness described the "Jacksonville" as being in navigable waters at the time of the accident, to wit, off Commodore's Point, at Jacksonville, Florida (R., 105) stating that the "Jacksonville" at the time of this accident was in the course of taking on oil (R., 106). It is not disputed that Johnson fell into the water between the two ships, the SS. "Jacksonville" and the SS. "West Compo". It was Johnson's firm conviction that he fell because of the defective rigging on the "Jacksonville" end of the gangplank between the two ships, the gangplank having been swung in a makeshift sling (R., 36) in order to protect the canvas deck (R., 149), a rope on one side of the sling having become untied at the time Johnson stepped upon it (R., 36, 44).

The tort from which Johnson suffered was, therefore, clearly a maritime tort and his rights were thus recognized by the maritime law. Those rights were the same whether he sought to enforce them in admiralty or in a common law court. That is the *Chelentis* rule. It does not depend upon the contract but solely upon the admiralty jurisdiction and the substantive rules of the maritime law.

## POINT II.

**The denial of the ruling requested as to the maritime rule of contributory negligence was in contravention to the principle of the exclusive jurisdiction of the maritime law with respect to the substantive law of maritime torts.**

The charge of contributory negligence in accordance with the rules of the common law that was made in the trial Court was in contravention of the well recognized rule that the jurisdiction of the maritime law as to a maritime tort is exclusive. It was admittedly the common law and not the admiralty rule of damages that was charged by the trial Court, but it was a *substantive* and not a *remedial* rule of law that was charged, and for that reason was not within the terms of the saving clause.

*Port of New York Stevedoring Co.* v. *Castagna,* 280 Fed. 618, 624 (cert. denied, 258 U. S. 631, 1922);
*Kennedy* v. *Cunard Steamship Co.,* 197 App. Div. 459, 467 (1st Dept. 1921);
*Central Vermont Railway* v. *White,* 238 U. S. 507, 512 (1914).

In the case of *Port of New York Stevedoring Co.* v. *Castagna,* an action at law, a longshoreman was precipitated into the hold of the steamer that was in navigable waters of the United States, when a rotten board, of which he had taken hold, broke. There was a question as to whether the condition of the board was so plainly observable that an ordinarily prudent person would have

appreciated the defect. In upholding the right of the plaintiff to recover irrespective of his contributory negligence in a common law action, the Court, Mayer, *J.*, stated the reason to be that the matter was one of right and not of remedy:

> "The right to recover irrespective of contributory negligence is a right, and not a matter of procedure, nor is it governed by the choice of the forum. In the case at bar, plaintiff has sought his remedy at common law to obtain redress arising out of a maritime tort. He entered the common-law court with the same right as he would have entered the admiralty Court. That was the right to recover, irrespective of his own negligence, provided, of course, he could show the negligence of his employer, and this right of plaintiff sprang into existence because he suffered a maritime tort. The trial Judge was peculiarly familiar with the question, for it was he who wrote the opinion in *Carter* v. *Brown, supra,* and our view is that his charge as to contributory negligence was sound."

The case of *Carter* v. *Brown,* to which the opinion in the *Castagna* case refers, is reported at 212 Fed. 293, and is a decision of the Circuit Court of Appeals for the Fifth Circuit, in a libel for personal injuries sustained by a seaman due to improper stowage of cargo. The opinion written by *Grubb, J.,* is a particularly lucid expression of the subject.

In addition to the opinion of Judges *Mayer* and *Grubb,* there is also the opinion of *Page, J.,* of the Appellate Division, First Department, New York, in the case of *Kennedy* v. *Cunard Steamship Company.* In this case

a longshoreman had brought an action at law to recover for injuries received by falling into an open hatchway. An order dismissing the complaint was reversed and a new trial ordered, the Court saying with respect to the law of contributory negligence applicable:

> "The instant case is an action for damage for personal injuries, for which there exists in this State a common-law remedy. Therefore, the action may be brought in our Supreme Court, the rules of practice, pleading and evidence of our courts apply, and the cause will be tried in conformity therewith; but the rules relating to contributory negligence, acts of fellow-servants, and the measure of recovery must be determined by the maritime law and not by the common law.
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> "In maritime law contributory negligence of the injured party does not defeat a recovery but goes to a reduction, or more appropriately, an apportionment of the damage. The general rule of the common law exempting the master from liability for injury to a servant by a fellow-servant is not fully applied by the maritime law. And the rules applicable to the recovery, whether a full indemnity, or wages, maintenance and cure, must be taken into consideration, and the relief given according to the rules of maritime rather than common law."

This Court announced in the case of *Chelentis* v. *Luckenbach Steamship Co.* (*supra*), at page 384:

> "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dictionary."

In *Central Vt. Railway* v. *White* (*supra*), a case arising under the Federal Employees' Liability Act, this Court said:

> "But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those States the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in States which hold that the burden is on the plaintiff."

Although the Court in this instance was concerned only with the rule of the burden of proof of contributory negligence, the reasoning of the Court leading it to the opinion that the rule of the burden of proof is one of substantive law is equally applicable to the rule of contributory negligence.

*The rule of contributory negligence applied by the trial Court being a rule of substantive law, and ad-*

*mittedly of common law, is clearly not within the scope of the saving clause of the pertinent sections of the Judicial Code. Nor may the charge be justified as an exercise of concurrent common law jurisdiction, for the reason that the grant of maritime jurisdiction as defined by the Constitution and defined by the Judicial Code is exclusive of such concurrent jurisdiction. It is only the common law remedy that is saved, not a remedy in a common law court.*

*Constitution,* Art. III, Section 2;
*Constitution,* Art. I, Sec. 8, Clause 18;
*Judicial Code,* Sec. 256, Act of September 24, 1789, R. S. 711, U. S. Code Title 28, Sec. 371;
*Judicial Code,* Sec. 24, Act of September 24, 1789, R. S. 563, U. S. Code, Title 28, Sec. 41;
*Martin* v. *Hunters Lessee,* 1 Wheaton, 304, 333 (1816);
*The Moses Taylor,* 71 U. S., 411, 428 (1866);
*Hine* v. *Trevor,* 71 U. S., 555, 568 (1866);
*Southern Pacific Co.* v. *Jensen,* 244 U. S., 205 (1916);
*Knickerbocker Ice Co.* v. *Stewart,* 253 U. S., 149 (1919).

The grant of jurisdiction of the Supreme Court with respect to admiralty matters was stated in *Article III, Section 2,* of the *Constitution* as follows:

"The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties

> made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; *to all Cases of admiralty and maritime Jurisdiction;* to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between citizens of different states, between citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." (Italic ours.)

The construction of the judicial power granted by the *Constitution,* with respect to the exclusive nature of those powers with respect to admiralty matters was made by *Justice Story* in the case of *Martin* v. *Hunters Lessee* (*supra*). The suit involved a mandate of the Supreme Court which the Court of Appeals of Virginia had refused to obey. *Justice Story* said, at page 332:

> "In wht cases (if any) is this judicial power exclusive, or exclusive, at the election of congress? It will be observed, that there are two classes of cases enumerated *in the constitution, between which a distinction seems to be drawn. The first class includes cases arising under the constitution, laws and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class, the expression is, and that the judicial power shall extend to all cases; but in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is

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dropped, seemingly *ex industria*. Here, the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, &c. From this difference of phraseology perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed, that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power, either in an original or appellate form, to *all* cases; and in the latter class, to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

"The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arising under the constitution, laws and treaties of the United States. Here, the state courts *could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts, previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect, not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as

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> it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudiciation of which foreign nations are deeply interested; it embraces also maritime torts, contracts and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromise the national sovereignty."

By *Article I, Section 8, Clause 18,* of the *Constitution,* Congress, it is to be remembered, was given power:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Although the jurisdiction of admiralty matters was not declared by the Constitution to be exclusive it was so declared by Congress in the exercise of the power conferred by Article I, Section 8, Clause 18, of the *Constitution,* by the *Act of September 24, 1789,* which has been embodied in *Sections 256* and *24* of the *Judicial Code. Section 256,* which deals with exclusive jurisdiction, is as follows:

> "*Exclusive jurisdiction of United States courts.* The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter

mentioned, shall be exclusive of the courts of the several States:

"First. Of all crimes and offenses cognizable under the authority of the United States.

"Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

"Thrd. *Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it* and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States.

"Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

"Fifth. Of all cases arising under the patent-right, or copyright laws of the United States.

"Sixth. Of all matters and proceedings in bankruptcy.

"Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

"Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls." (Italics ours.)

*Section 24* of the *Judicial Code,* which deals with original jurisdiction, is too long to quote entirely, but the pertinent clauses thereof are given as follows:

> *Original jurisdiction.* The district courts shall have original jurisdiction as follows:
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> * * * * * * * *
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> "(3) *Admiralty causes, seizures, and prizes.* Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize. The jurisdiction of the district courts shall not extend to causes arising out of injuries or to death of persons other than the master or members of the crew, for which compensation is provided, by the workmen's compensation law of any State, District, Territory, or possession of the United States.
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> "(20) *Suits against United States.* Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000. * * *
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> "(21) *Suits for unlawful inclosure of public lands.* Twenty-first. Of proceedings in equity, by writ of injunction * * *
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> * * * * * * * * *

"(25) *Partition suits where United States is joint tenant.* Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate."

The contest as to the exclusiveness of the admiralty jurisdiction has in the main been confined to two types of cases. These have been concerned with cases such as the *Moses Taylor,* in which States have attempted to give a lien and a remedy *in rem* with respect to maritime cases. The other cases are the type of *Southern Pacific* v. *Jensen,* and are of comparatively recent origin and are concerned with the attempt of States to give new rights and remedies as to maritime causes of action mainly through workmen's compensation acts. In the *Robbins Dry Dock* case, a State statute was sought to be made the basis of negligence in admiralty. In the *Chelentis* case, a common law theory of damages was sought to be imposed upon an admiralty cause.

The reasoning in these cases which proceeds upon the prohibition of an invasion of the admiralty jurisdiction, is applicable to the present case. The maritime substantive law may not be displaced by the law of the states, statutory law, or the common law.

If the jurisdiction of the maritime law and the common law with respect to maritime torts were intended to be concurrent, it is reasonable to suppose the *Judicial Code* would have so provided, as it did in a somewhat similar circumstance and with respect to claims in the Court of Claims (*Clause 20, Section 24, Judicial Code, supra*).

Neither may a construction of concurrent jurisdiction be entertained as a possible construction and limited in its application to the federal courts. The words "common law remedy" in the saving clause include in their natural meaning both state and federal courts.

The concurrent theory puts the state courts in the position of administering and adjudicating substantive rights arising under the maritime law and this is clearly against the express exclusive language of the *Judicial Code, Sections 24 and 256.*

The Court in *The Moses Taylor* case, on page 431, adopts the reasoning of *Justice Story* in *Martin* v. *Hunters Lessee,* and there states:

> "The case before us is not within the saving clause of the ninth section. That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it'. It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding *in rem,* as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute."

The reasoning of the Court in the case of *The Moses Taylor* is much relied upon by the Court in the *Chelentis* case (*supra*), at page 383.

In the *Moses Taylor* case, a statute of California had provided that steamers, vessels and boats shall be liable, among other things, for non-performance or mal-performance of any contract or transportation of persons or property, and one Hammonds had proceeded against

the vessel in a court of the Justice of the Peace, and had secured a judgment of $200, which judgment the Supreme Court reversed as having been granted without jurisdiction.

In the case of *Southern Pacific Co.* v. *Jensen,* the family of Jensen had an award from the Workmen's Compensation Bureau in New York, Johnson having been accidentally killed in the performance of his duties in unloading the steamship of the respondent, a Kentucky corporation, while the vessel lay at Pier 49 in the Hudson River. The steamship company appealed upon several grounds, among others, that the award was unconstitutional within the meaning of *Article III, Section 2,* of the *Constitution,* conferring admiralty jurisdiction upon the United States. The Court refused to uphold the award or to recognize the jurisdiction of the Workmen's Compensation Act to pass upon the maritime cause of action involved. The Court said:

> "Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, 'Saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it'. The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."

In the case of *Knickerbocker Ice Co.* v. *Stewart,* previously cited, this Court again had for consideration the validity of an award to the family of a marine worker

who was killed while working as a bargeman on the Hudson River. Between the time of the decision in this case and the decision in the case of *Southern Pacific Co.* v. *Jensen* (*supra*), the saving clause as set forth in *Sections 24 and 256* of the *Judicial Code* had been amended. The amendment was held ineffective, the Court holding that Congress could not delegate its legislative power. This Court reversed the award and after reaffirming the view that the saving clause conferred no substantive rights, stated at page 162, that the saving clause was not changed by the ineffectual attempt of Congress to amend it.

It is clear then from the foregoing authorities that the jurisdiction of the maritime law is exclusive in its substantive features and made so by the Constitution as that grant of power has been further declared and defined in the Judicial Code and that the recent amendments have not operated to lessen this exclusive feature. Being exclusive in its substantive features, it was exclusive of the common law rule of contributory negligence, that was charged by the trial Court in this case.

## POINT III.

**The trial Court, though proceeding at common law, could and should have proceeded upon the principles of justice and equity of the admiralty jurisdiction in charging the comparative negligence rule as it obtains in admiralty.**

The maritime tort suffered by Johnson being without question of maritime jurisdiction, the tort having occurred upon navigable waters of the United States, the trial Court should have acted upon the principles of justice and equity which are characteristic of the maritime law in permitting the rights of Johnson to be governed by the more equitable principles of the maritime law and embodied in the admiralty rule of comparative negligence.

> *Watts* v. *Camors,* 115 U. S. 353, 361 (1885);
> *The Marianna Flora,* 11 Wheaton 54 (1826).

In *Watts* v. *Camors,* the Court considered the equitable nature of the admiralty jurisdiction as follows:

> "In England and in this country, a court of admiralty, within the scope of its powers, acts upon equitable principles; and when the facts before it, in a matter within its jurisdiction, are such that a court of equity would relieve, and a court of law could not, it is the duty of the court of admiralty to grant relief."

In *The Marianna Flora,* a case of prize, *Justice Story* said:

> "The present case stands upon a strong analogy, and to inflict damages would be to desert

> that analogy. Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law."

The confines of the common law procedure were not so strict as to prevent the interposition of the equitable answer of the admiralty rule of contributory negligence to the affirmative defense of contributory negligence set up in the answer. Even before the enactment of the *Equitable Defense Act* it was the practice to allow equitable replies of fraud. A defense of release was allowed to be met by charges of fraud.

*Act of March 3, 1915,* C. 90, Judicial Code, Section 274B, U. S. Code, Title 28, Section 398;

*Wagner* v. *Mutual Life Ins. Co.,* 90 Fed. 395 (C. C. A., 6th Cir., 1898);

*Whitney Co.* v. *Johnson,* 14 F. [2d] 24 (cert. denied 274 U. S. 734, 1926).

The *Equitable Defense Act* states:

> "In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plain-

tiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

It could not have been necessary for Johnson to plead the maritime rule of contributory negligence as an equitable reply. That was part and parcel of his cause of action, just as much as his proof of negligence of the respondent. But at least under the New York Civil Practice Act, an affirmative defense is deemed denied without the necessity for the interposition of a formal reply.

*Conformity Act,* Act of June 1, 1872, R. S. 914, U. S. Code, Title 28, Sec. 24;
*New York Civil Practice Act,* Sec. 243, Cahill's New York Civil Practice (1928).

The request for the admiralty ruling of contributory negligence did not involve the enforcement of an admiralty procedure which the common law was incompetent to enforce such as a proceeding *in rem* or a limitation proceeding. (*Chisholm* v. *Northern Transportation Co.,* 66 Barb. 363, 1872.) It was merely a request for the Court to enforce as a maritime right that right which it enforces every day with respect to railway employees under the *Federal Employees' Liability Act,* U. S. Code, Title 45, Sec. 53, and with respect to seamen under the *Jones Act,* U. S. Code, Title 46, Sec. 688, in actions at law and before a jury.

## POINT IV.

**The cases upon which the Circuit Court of Appeals affirmed the ruling of the trial Court do not support that ruling.**

Neither of the cases of *Atlee* v. *Packet Steamship Co.*, 88 U. S. 389 (1874), nor *Belden* v. *Chase,* 150 U. S. 674 (1893), are sufficient authority for upholding the ruling of the trial Court that contributory negligence is a bar to a recovery in this action.

Although there are distinctive points about each of these cases, the clear defect in these cases from the standpoint of their weight as authority in the present instance, is that in neither of these cases was the point made as to whether contributory negligence in an action for a maritime tort brought in a common law court was a bar, the main point in issue in the instant case. In both the *Atlee* and *Belden* cases, it appears from the briefs of counsel and from the assignments of error that the point of contributory negligence was not briefed or considered as at issue by counsel and, not having been at issue, the point may not be considered as having been well considered.

In the *Atlee* case, the Union Packet Company had filed a libel against Atlee for the sinking of a barge caused by a collision with a stone pier which Atlee had built on a navigable portion of the Mississippi River. The Circuit Court had found Atlee entirely at fault and decreed whole damage against him. The Supreme Court found contributory negligence against the Packet Company,

and reversed the judgment of the lower Court with a decree for half damages. *Mr. Justice Miller,* it is true, said at page 395, that the plaintiff had a concurrent remedy at law, and that if there were contributory negligence on the part of the plaintiff the plaintiff could not recover in a common law action. No authorities, however, and no reasons were given in support of this view, and as the case involved a libel proceeding this part of the opinion is clearly dicta, and has no force either as precedent or logic in this case.

In the *Belden* case, the plaintiff had secured a verdict for $27,668.28, which the Court of Appeals of New York affirmed without opinion, one judge dissenting with opinion. The defendant's yacht was a coasting vessel and bound to carry central range lights while navigating the Hudson River, and did not have them. The pilot of the plaintiff-in-error on the other hand had decided to pass to the left of the coasting vessel after he had signalled that he would pass to the right. The points argued before the Supreme Court, however, did not include the question as to whether the maritime law of contributory negligence and apportionment of damages was applicable. Both counsel seemed to assume that that point was not involved, for it was not briefed and there is no assignment of error upon that point. The argument of counsel for each of the parties was wholly devoted to the point that their clients were free from blame and that the negligence of the other party was the cause of the collision.

The only other case relied upon by the Circuit Court of Appeals for the Second Circuit, in upholding the trial Court, was that of *Maleeney* v. *Standard Shipbuilding Co.,* 237 N. Y. 250 (1923). This case relied entirely

upon the authority of the two foregoing decisions of *Atlee* v. *Packet Steamship Co.* and *Belden* v. *Chase.* No extended discussions for the reasons for relying upon this authority was entered into in the *Maleeney* case. On page 262 the Court said that the Court should follow the ruling of the United States Supreme Court in the case of *Belden* v. *Chase,* "until that court modifies or limits the authority", evidently not agreeing with that case or with the present state of law as that Court conceived it to be.

These cases give no consideration whatever to the fundamental reasons that have been thoroughly discussed in those other cases concerning the development of the *Chelentis* rule, mentioned *supra.* It would seem, therefore, that these cases have no controlling influence in the consideration of the present case. The view urged by Johnson is the view of the later and well reasoned decisions of this Court in the cases of *Chelentis* v. *Luckenbach SS. Co., Carlisle Packing Co.* v. *Sandanger, Southern Pacific Co.* v. *Jensen, Knickerbocker Ice Co.* v. *Stewart,* and related cases cited *supra.* The *Maleeney* case was clearly made to depend upon the *Belden* case, while the *Belden* case was made to depend upon the *Atlee* case, in which latter case the point was clearly dicta and had nothing to do with the decision. The Court in the present case, therefore, is concerned with a chain of legal error founded upon a misconception, conceived in dicta.

## *CONCLUSION.*

***It is respectfully submitted that the rulings of the Circuit Court of Appeals for the Second Circuit and of the trial Court in holding that the plaintiff who had been invited on board the SS. "Jacksonville" with respect to signing on as a carpenter or handy-man, was barred from recovery for the maritime tort which he suffered, in the event that the jury should find that his negligence contributed to the injury, are in error and opposed to the most recent decisions of this Court, chiefly that of the Chelentis case and are decisions that if allowed to stand, will be harmful to the proper application and understanding of the maritime law of the United States, and that this Court should reverse the decision of the lower Court and direct a new trial be had in this action.***

Respectfully submitted,

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